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69776—25——1

# In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 273

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY Company, petitioner

*v.*

THE UNITED STATES OF AMERICA

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

## BRIEF FOR THE UNITED STATES

### OPINIONS BELOW

Circuit Judges Alschuler, Evans, and Page concurred in the opinion of the Circuit Court of Appeals (R. 51) (3 Fed. Rep. (2d) 138), which affirmed the judgment of the District Court entered by Judge Cliffe (R. 9) for $600 and costs (298 Fed. Rep. 549).

### JURISDICTION

On application of the petitioner under Section 240, Judicial Code, and the Act entitled "An Act

to amend the Judicial Code," etc., approved September 6, 1916 (Ch. 448, 39 Stat. 726), this Court allowed the writ of certiorari, the Government consenting.[1]

STATEMENT

The Atchison, Topeka & Santa Fe Railway was adjudged guilty of violating the Hours of Service Act (Ch. 2939, 34 Stat. 1415) in its Corwith Yard, which is bounded by 38th Street on the north, 47th Street on the south, Kedzie Avenue on the east, and Crawford Avenue on the west, in the city of Chicago.

The Corwith Yard extends in a northerly and southerly direction. The Santa Fe main line enters Chicago from the west and runs in a general easterly and westerly direction between the channels of the Sanitary District on the north and Illinois and Michigan Canal on the south, which are about 500 feet apart.

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[1] In the petition for writ of certiorari it is represented (p. 2) that "some 10,000 yardmasters are affected." In *Missouri Pacific* v. *United States*, 211 Fed. Rep. 893, the Circuit Court of Appeals for the Eighth Circuit took a view contrary to that expressed by the Court of Appeals in the instant case. In view of the large number of employees involved and of these conflicting decisions, the Government consented to the issuance of the writ. Hearings in other cases in the Seventh Circuit have been continued pending the decision of this case.

The group of counsel on the brief for the Santa Fe would indicate that at least four trunk-line railway systems are directly concerned. John G. Drennan, Esq., and E. C. Craig, Esq., are General Attorneys for Illinois Central Railroad; Nelson J. Wilcox, Esq., is Assistant General Solicitor for Chicago & North Western Railway; Homer W. Davis, Esq., is General Attorney for the Santa Fe Railway System; and J. A. Connell, Esq., is Attorney for Illinois District, Chicago, Burlington & Quincy Railroad (Railway Guide, Nov. 1925, I. C., 629; C. & N. W., 784; S. Fe, 925; C., B. & Q., 960).

South and parallel to the channel of the Illinois and Michigan Canal lies the main line of the Chicago & Alton Railroad, in an easterly and westerly direction.

The main line of the Chicago & Alton is about one block, and the main line of the Santa Fe is about four blocks, north of the northern end of Corwith Yard. The main line of Santa Fe and Corwith Yard are connected by two " wye " tracks. The west " wye " is used for moving western inbound and outbound traffic into and out of the Yard. The east " wye " is used for moving eastern inbound and outbound traffic into and out of the Yard.

Across Santa Fe main line straight north from the Yard lies a north and south track known as its 26th Street line, which connects with the Illinois Northern.

The main line of the Chicago & Alton and the Yard are also connected with a " wye " over which traffic moves between the Corwith Yard and Chicago & Alton.

West of the Corwith Yard, a mile and a half, the Chicago & Western Indiana and Belt railroads cross, in a northerly and southerly direction, the Chicago & Alton and Santa Fe main lines. That crossing is controlled by " Nerska Tower," an interlocking plant operated by a man in a tower.

Three miles east of Corwith the Pan Handle tracks cross the main line of Santa Fe at Ash

Street crossing. East thereof is a joint line used by Santa Fe and the Illinois Central; and still farther east and north, at 18th Street and Wentworth Avenue, is located what is known as the 18th Street Yard of the Santa Fe, where another yardmaster is located.

Corwith Yard is the make-up, break-up, assembling, and distributing yard of the Santa Fe for eastbound and westbound freight. Engines from other lines also bring cars to Corwith Yard for delivery to the Santa Fe. Road trains for the West are made up in and leave the Yard.

Bray and McCollom were Santa Fe yardmasters in the Corwith Yard during July, 1921 (R. 12). Bray, mentioned in causes of action 1, 2, and 3, remained on duty from 6 p. m. to 6 a. m.; and McCollom, mentioned in causes of action 4, 5, and 6, remained on duty from 6 a. m. to 6 p. m. (R. 12). The facts with respect to the first three causes of action are the same as in the second three, and the same judgment shall apply to all (R. 11).

The Corwith Yard yardmaster has an office at the north end of the Yard, indicated on the map at 39th Street. He has jurisdiction over and control of all train movements within the Yard. Two blocks north is Corwith Tower (indicated in red) (Pet. Br. 7).

H. F. McCollom is yardmaster whose duties require him " to see the cars," " have the men place them where they belong," and " see that every-

thing is properly handled around the Yard." He has general supervision of the Corwith Yard while on duty. He gives no orders to road trains (R. 15). In his office he has a city phone and a tower phone to Nerska and Corwith (R. 15). When Chicago & Alton trains are ready to come into the Yard, and (R. 15) the towerman sees the Yard is clear, sometimes he gives the Chicago & Alton train the target and lets it into the Yard; *sometimes he calls up the yardmaster. The practice was for the Chicago & Alton towerman to call up the yardmaster* (R. 15).

When a train left the Corwith Yard over the east " wye " to the Santa Fe main line, it was necessary to get the target or signal from the Corwith towerman before the train could proceed. *The yardmaster would either call up the towerman,* or the engineer would blow the whistle for the signal. The object of telephoning the towerman was to keep from blocking things at the north end of the yard, where there is one lead to work on (R. 15).

Trains coming in over the east " wye " whistled, while on the main line, to get the target from the towerman at the Corwith Tower. *Sometimes he would call the yardmaster on duty to find out if the train could come into the yard without blocking it* and sometimes he would not. " If he calls me up, and I find I can take them into the yard, I say to him, ' Let him come.' Trains go from the Yard over the west ' wye ' and enter the Yard therefrom

in the same manner." (McCollom,[2] yardmaster, R. 16.)

On July 7, 1921, such telephone conversations to the number of 13 continued throughout the day by this yardmaster which related to the movement of trains (R. 17–18).

On July 8, 1921, at 6.45, the yardmaster called the Corwith Tower and said, "Local is ready to go." The towerman said, "Let her come," and the yardmaster let her go (R. 18).

Further similar telephone conversations to the number of 23 continued throughout the day, making a total of 24 telephone conversations held that day by this yardmaster which related to the movement of trains (R. 19–20).

For July 9, 1921, counsel for the respective parties agreed that the work of Yardmaster McCollom was substantially the same as on the two preceding days (R. 21).

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[2] Witness H. F. McCollom, Yardmaster, Corwith Yard, testified that on July 7, 1921, he had his first telephone conversation at 6.29 a. m. (R. 16); the telegraph operator at Corwith called and said Extra 3173 would be in at 2 p. m. with 27 perishable; the operator was located at the Corwith freight office; he handled train orders; the purpose of his calling the yardmaster was to give the yardmaster the consist of what was coming, so the yardmaster would know how to handle his power; whether to send an engine out of the yard or not; *that information would help the yardmaster to expedite the movement of trains in and out of the yard* (R. 16, 17).

The next telephone message was at 6.45. Yardmaster called Corwith Tower; "Local is ready to go west"; the object was to get the train across the lead tracks at the north end of the yard without blocking anything and not letting the train pull up to the board until the towerman would give them the signal, which would permit the train to pull out across the C. & A. to the main line of the Santa Fe; that was a local freight train; under our practice, *before I would send a local out, the towerman would advise me over the telephone that it was all right to let it go* (R. 17).

Witness Haushalter, operator and leverman in the Corwith Tower July 7, 8, and 9, 1921, under the superintendent of Terminals of Chicago & Alton, testified that the man with whom he has the most conversation was the yardmaster (R. 27); that he never let a train go into the yard when the yardmaster told him to hold it (R. 28); that he always let them go in when he told him to let them come if he could do so without delaying a superior train; the yardmaster does not always call him up when trains go out of the yard; he gets the whistle signals and gives them the board (R. 28); he does not always call up the yardmaster when a train is going into the yard; it depends on whether there is a C. & A. train due soon; if there is plenty of time he just lets the trains in on the yardmaster, who had information they were coming and he was responsible for taking care of them; they could not go on into the yard if the switches were against them; witness does not have anything to do with the yard switches (R. 28).

Witness further testified that the telephone messages were for *the purpose of expediting the movement of these trains* and not for the purpose of finding out what was the condition of the switches leading into the yard. *The telephone was used in a large majority of cases* (R. 28).

Witness Minchin testified (R. 30) *there are three telephones in the yardmaster's office,* one telephone is between the yardmaster's office and the tower-

man, *the yardmaster is on one end and the towerman on the other* (R. 32).

Opposing counsel emphasize that "no passenger trains go through" (Br. 5). This is far from saying that passenger trains may not be influenced indirectly in their movements by the yardmaster's telephones. Yardmaster McCollom testified (R. 17) that on July 7, 1921, in a telephone conversation at 10.25 a. m. the tower called and said, "Extra 3164 from west," and the yardmaster said, "Let it come," but it did not come because Corwith Tower called back at 10.26, one minute later, and said he would have to hold Extra 3164 for C. & A. No. 1, which was a passenger train. The witness said, "All right." At 10.40 a. m. (R. 18) Corwith Tower said, "Extra 3164 was ready to come." I said, "Let her come." The train came in.

**STATUTE**

The Act entitled "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon" (Ch. 2939, 34 Stat. 1415), approved March 4, 1907, commonly known as the Hours of Service Act provides:

* * * * *

> SEC. 2. That it shall be unlawful for any common carrier, its officers or agents, subject to this Act to require or permit any employee subject to this Act to be or remain on duty for a longer period than sixteen consecutive hours, and whenever any such em-

ployee of such common carrier shall have been continuously on duty for sixteen hours he shall be relieved and not required or permitted again to go on duty until he has had at least ten consecutive hours off duty; and no such employee who has been on duty sixteen hours in the aggregate in any twenty-four-hour period shall be required or permitted to continue or again go on duty without having had at least eight consecutive hours off duty: *Provided,* That no operator, train dispatcher, or other employee who by the use of the telegraph or telephone dispatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements shall be required or permitted to be or remain on duty for a longer period than nine hours in any twenty-four-hour period in all towers, offices, places, and stations continuously operated night and day, nor for a longer period than thirteen hours in all towers, offices, places, and stations operated only during the daytime, except in case of emergency, when the employees named in this proviso may be permitted to be and remain on duty for four additional hours in a twenty-four-hour period on not exceeding three days in any week: *Provided further,* The Interstate Commerce Commission may after full hearing in a particular case and for good cause shown extend the period within which a common carrier shall comply with the provisions of this proviso as to such case.

QUESTIONS

Was the yardmaster an "operator, train dispatcher, or other employee"?

Were the telephone messages that the yardmaster received and transmitted "orders"?

Was the Corwith Yard office of the yardmaster in which the telephones were located and used within the words "in all towers, offices, *places,* and stations continuously operated night and day"?

ARGUMENT

SUMMARY

I. THE YARDMASTER WAS AN OPERATOR, TRAIN DISPATCHER, OR OTHER EMPLOYEE, WITHIN THE MEANING OF THE STATUTE. CHICAGO & ALTON v. UNITED STATES, 247 U. S. 197, 200; 244 FED. REP. 945; CHICAGO, ROCK ISLAND & PACIFIC v. UNITED STATES AND CHICAGO & NORTH WESTERN v. UNITED STATES, 226 FED. REP. 27, 30.

II. THE TELEPHONE MESSAGES THAT WERE RECEIVED AND TRANSMITTED BY THE YARDMASTER WERE ORDERS WITHIN THE MEANING OF THE STATUTE. UNITED STATES v. PENNSYLVANIA RAILROAD, 239 FED. REP. 576; CHICAGO, ROCK ISLAND & PACIFIC v. UNITED STATES, 226 FED. REP. 27, 29; DELANO v. UNITED STATES, 220 FED. REP. 635; DISTINGUISHED, UNITED STATES v. FLORIDA EAST COAST RAILWAY, 222 FED. REP. 33.

III. THE OFFICE OF THE YARDMASTER IN THE CORWITH YARD AS HIS "POST OF DUTY" WAS WITHIN THE STATUTE. CHICAGO & ALTON v. UNITED STATES, SUPRA; UNITED STATES v. PENNSYLVANIA RAILROAD, SUPRA; UNITED STATES v. ATCHISON, TOPEKA & SANTA FE, 220 U. S. 37, 43.

## I

THE YARDMASTER WAS AN "OPERATOR, TRAIN DISPATCHER, OR OTHER EMPLOYEE" WITHIN THE MEANING OF THE STATUTE

Opposing counsel maintain that "No one can properly contend that, applying the rule of *ejusdem*

*generis,* a yardmaster would come within the same class of employees as train dispatchers or operators" (Br. 25). The rule has already been rejected by this Court in the construction of this statute.

In *Chicago & Alton Railroad* v. *United States,* 247 U. S. 197, 200, it was maintained that switch tenders, regardless of their use of the telephone in receiving or transmitting orders with respect to the movements of trains, were not, under the rule *ejusdem generis,* within the proviso.[3]

In affirming the judgment of the Circuit Court of Appeals in that case (*C. & A.* v. *United States,* 244 Fed. Rep. 945), which had followed its decisions in *Chicago, Rock Island & Pacific* v. *United States* and *Chicago & North Western* v. *United States,* 226 Fed. Rep. 27, 30, all of which cases had

[3] In that case this Court granted the petition for writ of certiorari. In the brief of counsel for Chicago & Alton, in support of the petition, it is stated that, under the doctrine "*ejusdem generis,*" switch tenders were not within the scope of the statute; and to bring that doctrine into play "there must be substantial similarity in function, not merely in terms, between the persons or things sought to be included by the general words and the specifically named persons or things."

In their final brief counsel for the Chicago & Alton cited *Missouri Pacific* v. *United States,* 211 Fed. Rep. 893, and stated that the "reasoning of Judge Carland in that case and his application of the doctrine of *ejusdem generis* is perfectly in accord with established principles of statutory construction, * * * (C. & A. Br. 48).

In the Government's brief in that case it is stated (Gov. Br. 13) "The entire argument for reversal rests upon an attempted application of what is sometimes known as Lord Tenterden's rule, which has been stated by this Court to be 'that where particular words of description are followed by general terms the latter will be regarded as referring to things of a like class with those particularly described—*ejusdem generis*' (*United States* v. *Mescall,* 215 U. S. 26, 31)."

rejected the rule *ejusdem generis,* this Court, speaking through Mr. Justice McReynolds, in referring to the foregoing decisions, said (247 U. S. 200):

> The individuals within the ambit of the proviso's pertinent provisions are marked by the nature of service performed—an "operator, train dispatcher, or other employee who by the use of the telegraph or telephone dispatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements." And the railroad is forbidden to permit one performing such service in "towers, offices, places, and stations continuously operated night and day" to remain on duty therein longer than nine hours in twenty-four. Both the post of duty and character of work are essential elements. If in due course of his work an employee while in any of the locations specified uses the telegraph or telephone for sending or receiving messages concerning train movements, he may not lawfully remain on duty therein exceeding nine hours during any twenty-four-hour period, except in case of emergency.
>
> Here the facts disclose the switch tender on duty for twelve consecutive hours in a shanty continuously operated night and day, where, by the use of the telephone, he received and delivered orders pertaining to train movements—not mere switching movements within the yard; and in such service mental and physical alertness are of great

importance. By permitting this the railroad violated both language and purpose of the act.

In the instant case the learned Circuit Court of Appeals in its decision followed the decision of this Court in the *Chicago & Alton case.*

## II

### THE TELEPHONE MESSAGES THAT WERE RECEIVED AND TRANSMITTED BY THE YARDMASTER WERE ORDERS WITHIN THE MEANING OF THE STATUTE

Yardmaster McCollom testified (R. 26):

> Q. Now, what was the difference in effect between the yardmaster or the Corwith Towerman calling you up and saying that a train was ready and you replying to him to let her come, and a report that you would send him that a train was ready to go out and he would say, "All Right." What was the difference between those two messages, so far as their effect upon the movement of the train was concerned?
>
> A. There wasn't any, I should say.
>
> The orders given by the telegraph operator to the train crews of road trains give them the right to go out of the yard over the C. & A. crossing, but they can not do that until the Towerman gives them the signal, and they can not go out of the yard if I tell them to stay where they are; but if I don't do anything, and the Towerman gives them the signal, then they can go out.

Witness Haushalter, operator and leverman of the Corwith Tower, testified (R. 28):

> *The telephone messages were for the purpose of expediting the movement of these trains* and not for the purpose of finding out what was the condition of the switches leading into the yard. *The telephone was used in a large majority of cases* (italics ours).

Counsel for the Santa Fe seek to draw a distinction between what they term "orders" and "information" (Br. 29), and they cite and rely on *United States* v. *Pennsylvania Railroad*, 239 Fed. Rep. 570, from which they quote copiously (Br. 30). In that case District Judge Dickinson held that the act which was intended to avoid the danger resulting from exhausted employees must be liberally construed to repress the evil and advance the remedy, and that a yardmaster (who appears to have engaged in duties substantially similar to those in the instant case) was within the statute.

Here again counsel run counter not only to the opinion of this Court in the *Chicago & Alton case* but to the preponderance of opinion in other courts.

In *Chicago, Rock Island & Pacific* v. *United States*, 226 Fed. Rep. 27, 29, *supra*, Circuit Judge Mack, speaking for the Court of Appeals, said:

> Unquestionably, the important object of the statute was to conserve the safety of the traveling public and of railroad employees; the relation between industrial fatigue and inefficiency was recognized; the statute aims to obviate the latter by checking the former. Not merely safety, but general efficiency, promptness of service is thereby promoted.

> Concededly, greater regularity in the passenger service is secured, if the defendant's trains are no longer slowed down and held up at the crossing. Orders designed to accomplish even this result would, therefore, be within the purview of the act.
>
> But who can say that the violation of any order pertaining to or affecting train movements *might* not result in some accident? That other measures obviated the possibility of a collision at the Gresham crossing is immaterial, for surely regularity of service at that point might well prevent an accident at some other point. *The information telephoned by the switchman was equivalent to a direction to the leverman to let the oncoming passenger train pass; an order, originated, it is true, by some superior officer, not by the switchman, but none the less an order transmitted by him* (italics ours).

In *United States* v. *Houston Belt Railway Co.*, 205 Fed. Rep. 347, 348, the Circuit Court of Appeals for the Fifth Circuit said:

> It is contended on behalf of the railroad company that the word "orders" in the statute must be construed to mean what the railroads technically call "train orders"; that is, such orders as emanate from the train dispatcher's office and are reduced to writing and handed to the conductor and engineer of a train. We can not agree with this contention. To do so would be to pervert the plain meaning of the statute. An

order affecting train movements may be given by a wave of the hand or the flash of a lantern, and its disobedience might cause as dire consequences as the failure to obey a written message. Necessarily an order affecting train movements can be given by any subordinate having to do with trains and switches, such as a towerman.

The railroad further contends, however, that the telephone between these towers is not used to transmit " orders " in any sense of the word. Regarding this, it is evident, from the testimony of the towermen quoted above, that they use the telephone to repeat signals from the trainmen which indicate the routing of the train as originally made by the train master; that they give information over it that trains have started, on receipt of which information the other towerman must throw switches, line up tracks, and hold other trains, as a matter of duty and without discretion on his part; and that they run trains in both directions over a single track and instruct the other towermen by the telephone as to holding traffic. It is therefore evident that these towermen use the telephone to dispatch, report, transmit, receive, and deliver orders appertaining to or affecting train movements. To say that these towermen only used the telephone for the giving of information not covered by the statute would be the merest sophistry. Indeed, it is difficult to conceive how anything could be a more imperative

> order affecting train movements than for one towerman to notify another that he had started a train, at the same time telling him to hold all traffic in the opposite direction over the same track.

In *Delano* v. *United States,* 220 Fed. Rep. 635, the Circuit Court of Appeals for the Eighth Circuit held that the carrier is not relieved from liability by requiring a train dispatcher in a night-and-day office to remain on duty for more than 9 hours in each 24-hour period by the fact that during a part of such time he is employed otherwise than as train dispatcher.

In the instant case District Judge Cliffe said (298 Fed. Rep. 551):

> The evidence as to several kinds of messages or orders that McCollum and Bray transmitted over the telephone, it seems to me, tells the story without any question. Certain rules, designated as 521 and 522, provide in effect that "all trains or engines without trains will be under the control of the yardmaster, and all employees in trains or engines will be subject to his instructions," and that he (the yardmaster) "is responsible for the prompt movement of cars, the proper position of the switches, and the expeditious dispatch of trains within the limits of the yards." Outside of the yards on the main lines these trains are directed by the train dispatchers, and, as has been well said in one of the briefs filed herein—

> "It will thus be seen that the expeditious main-line road movements may be advanced, handicapped or retarded by the work of the Corwith yardmaster."
>
> The evidence as to what was actually done by means of the telephone in regard to the movement of trains shows, without question in my mind, that the yardmasters had the general direction of all train movements within the yard limits, and that the use of the telephone by the yardmaster is not occasional or exceptional, but is indeed a part of his usual duties.

In the instant case Circuit Judge Evans of the Circuit Court of Appeals said (3 Fed. Rep. (2d) 138, 139):

> The term "order" has been defined in *United States* v. *H. B. & T. Ry. Co.*, 205 F. 344, 125 C. C. A. 481, and with the conclusions there reached we agree. "Orders," as used in this statute, should not be limited to train orders issuing from the train dispatcher's office. Neither should the term be restricted to orders reduced to writing. Orders may be given by one authorized so to do merely through the wave of a lantern, the movement of arms, or by the change of light in a signal station.
>
> There is a difference, as counsel for plaintiff in error points out, between giving orders and imparting information. This may be well illustrated in a switching operation in the night. The brakeman who

makes the coupling may give information to the conductor by the swinging of his lantern. The conductor will then give a somewhat similar lantern signal to the engineer. Both of these signals are informative, but one is purely so, while the other is primarily an order.

The testimony in the present case does not permit of a conclusion which recognizes the communications that passed between the towermen and switchmen merely as information. The communications that were received or delivered over the telephone were "orders," which the receiving party was not at liberty to ignore. They dealt with the movement and operation of trains. Their form—whether in the nature of a command or worded as a request—is not at all determinative of the question.

Our decision is based upon the conclusion we have reached respecting the nature and necessary effect of the directions which passed between these two employees of the company. We think they were "orders," within the meaning of the statute.

In *United States* v. *Florida East Coast Railway*, 222 Fed. Rep. 33, the Circuit Court of Appeals for the Fifth Circuit held that a train conductor who had no fixed place for work except on a moving train and who, under the first clause of Section 2, may be permitted or required to work 16 hours was not included in the proviso.

## III

### "THE POST OF DUTY" BROUGHT THE YARDMASTER WITHIN THE STATUTE

Opposing counsel argue that the yardmaster is not within the statute because "the post of duty" of the yardmaster is not embraced within the words "all towers, offices, places, and stations." Here again they say that "'Places' of necessity must refer to similar 'places'—places like towers, offices, and stations" (Br. 46). Further they say "The yard was no more a 'place' than would be the railroad" (Br. 47).

The book of rules of the operating department of the Santa Fe provide (R. 22), "At stations where a yard force is employed, all trains or engines without trains will be under the control of the yardmaster, and all employees in train or engines will be subject to his instructions."

Yardmasters McCollom and Bray received and transmitted these telephone messages in the Corwith Yard. "There are three telephones in the yardmaster's office" (R. 32). When the yardmaster was transmitting and receiving these messages he was not "all over the yard." In the *Chicago & Alton Case, supra,* the place in which the switch tender was on duty was a shanty. The office of the yardmaster certainly rises to the dignity of that standard.

In *United States* v. *Pennsylvania Railroad,* 239 Fed. Rep. 576, on which opposing counsel rely, the

yardmaster apparently was using his office for receiving and transmitting messages precisely as in the instant case.

In *United States* v. *Atchison, Topeka & Santa Fe*, 220 U. S. 37, 43, this Court said:

> We think that the Government is right in saying that the proviso is meant to deal with *all* offices, and if so, we should go farther than otherwise we might in holding offices not operated only during the daytime as falling under the other head (italics ours).

## CONCLUSION

The judgment of the Circuit Court of Appeals should be affirmed.

WILLIAM D. MITCHELL,
*Solicitor General.*
BLACKBURN ESTERLINE,
*Assistant to the Solicitor General.*

NOVEMBER, 1925.